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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-194

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

CELIO DIAZ, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: New York, N.Y.
August 9, 1971

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v.

CELIO DIAZ, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on April 6, 1971.

Opinions Below

The opinion of the District Court for the Southern District of Florida (pp. 1a-23a, *infra*) is reported at 311 F. Supp. 559 (1970). The opinion of the Court of Appeals (pp. 26a-35a, *infra*) is reported at 442 F.2d 385.

Jurisdiction

The judgment of the Court of Appeals was entered on April 6, 1971. A petition for rehearing *in banc* was denied on May 10, 1971 (p. 36a, *infra*). This Petition will be timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

Section 703(e) of the Civil Rights Act of 1964 (hereinafter "the Act"), 42 U.S.C. §2000e-2(e), permits hiring to be limited to persons of one sex where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

1. In deciding that Petitioner's policy of hiring only females as airline cabin attendants was unlawful under Section 703(a) of the Act, did the Court of Appeals err:

(i) in holding that the Section 703(e) exemption was available "only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively";

(ii) in holding that "the primary function of an airline is to transport passengers safely from one point to another," and that the *cabin attendant's* primary function—providing reassurance to airline passengers and making flights generally as comfortable and pleasant as possible under airline operating conditions—was accordingly "merely tangential" to the operation of an airline, so that

(iii) even if, as the District Court found, a qualification limiting cabin attendant hires to females demonstrably improves the quality of service provided to passengers, the qualification is unlawful under Section 703(a) of the Act?

2. The District Court having found, as a matter of fact and on adequate evidence, that the exclusion of males from hire as cabin attendants was reasonably necessary to the normal operation of Petitioner's airline business, did the Court of Appeals err in concluding that it was not?

Statutory Provisions Involved

Section 703(a)(1) of the Act, 42 U.S.C. §2000e-2(a)(1), provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire . . . an individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."

Section 703(e) of the Act, 42 U.S.C. §2000e-2(e), further provides:

> "(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."*

* This provision is sometimes referred to as the "BFOQ" provision.

Rule 52 of the Federal Rules of Civil Procedure provides, in pertinent part:

> "Findings by the Court
>
> "(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

Statement of the Case

1. The Trial and Findings in the District Court

Respondent, Celio Diaz, Jr., a male, applied for the position of cabin attendant with Petitioner, Pan American World Airways, Inc. ("Pan Am") in 1967. Pan Am had, since 1965, followed a system-wide policy of restricting new hiring for that position to females, and declined to employ Diaz (R. 597).*

Thereafter, on February 14, 1969, Diaz filed a complaint with the United States District Court for the Southern District of Florida, on behalf of himself and all others similarly situated, alleging that Pan Am's policy of hiring only females as cabin attendants violated Section 703(a) of the Act, 42 U.S.C. §2000e-2(a), and seeking an injunction and damages (R. 541-47).

* "R." refers to the record as certified to this Court by the Court of Appeals. The case was heard *in forma pauperis* in that Court.

Pan Am's answer admitted that it currently had a policy of restricting its hiring for the cabin attendant position to females, and the parties stipulated that the primary issue for the District Court to determine was whether being a female is a bona fide occupational qualification for the job of Pan Am cabin attendant,* reasonably necessary to the normal operation of Pan Am's business and thus lawful under Section 703(e) of the Act, quoted *supra*, p. 3 (R. 559, 561).

The trial was held on September 23-25, 1969, without a jury. At the beginning of the trial, the Court ruled that Pan Am had the burden of proving that its policy of excluding males from the hiring process was in fact reasonably necessary to the normal operation of its business (R. 17-20, 816). See *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969). Pan Am thereupon introduced evidence describing (i) its experience and that of other airlines with both male and female cabin attendants over the forty years during which Pan Am and the other airlines had employed them, (ii) the historical evolution of the functions of cabin attendants over those years, (iii) the importance of those functions, as presently defined, to the comfort and satisfaction of airline passengers and to the growth and economic health of the airlines, and (iv) airline experience demonstrating that those functions are better performed when men are excluded from hire for that position (*e.g.*, R. 91-106, 124-25, 131-37, 148-50, 202-05, 213-14, 220-21; Pan Am Ex. 16, pp. 1243-48, 1262-69).

* Pan Am's cabin attendants are divided by their union contract into (1) stewards and stewardesses, and (2) pursers (Pan Am Ex. 10, p. 8). Initial hire has always been at the steward-stewardess level, and pursers are promoted from that level, never hired (R. 89). The precise issue presented, accordingly, was whether being a female was a bona fide occupational qualification for the *steward-stewardess* position (R. 818).

On April 8, 1970, the District Court filed a lengthy Memorandum Opinion (pp. 1a-23a, *infra*) incorporating its findings and conclusions pursuant to Rule 52 of the Federal Rules of Civil Procedure. The findings include the following:

1. ". . . Pan Am hired males as cabin attendants from the late 1920's until 1965, and was, in fact, the last major U.S. carrier to exclude males from hire for the flight attendant position" (p. 5a, *infra*).

2. "Pan Am . . . began in 1944 to add female stewardesses to its crews, and this mixed hiring pattern continued for the next 15 years, during which both the stewards and stewardesses were covered by the same union contract, which placed them on a single seniority list and made no distinction in their duties" (p. 8a, *infra*).

3. "The prime function of the cabin attendant, as the job was defined by Pan Am with the introduction of the jets in 1958, became to provide passengers, so far as possible, with friendly personalized service, to instill a sense of comfort and well-being in flight, and to provide maximum reassurance to the new 'mix' of travellers Pan Am was carrying" (p. 9a, *infra*).

4. "While the males were found capable of satisfactorily performing what Pan Am (like other airlines) describes as the 'mechanical' functions of the flight attendant's job, such as the stowage of coats and the preparation and service of meals and beverages, the male stewards were found, as a group, not to be the equal of the females in the 'non-mechanical' functions which had now become more important—providing reassurance to anxious passengers, giving courteous personal-

ized service, and in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations" (p. 9a, *infra*).

5. "Despite its best efforts to select the most qualified and motivated individual stewards and stewardesses, Pan Am had found [by 1959] that of the thousands it had hired over the years, the males generally proved to be not as well qualified or motivated to perform their non-mechanical functions as the females it hired. [Pan Am] found that there was a significant statistical probability that a new-hire stewardess would make a better cabin attendant than a new-hire steward" (pp. 9a-10a, *infra*).

6. ". . . Pan Am, in 1959, in order to improve the average level of service on its airline for the jet age, and on the basis of the experience just described . . . determined to hire only female stewardesses" (p. 10a, *infra*).*

7. ". . . Pan Am's current hiring policy [females only] is in fact the result of . . . a pragmatic process . . . , representing a judgment made upon adequate evidence acquired through Pan Am's own considerable experience, and designed to yield under Pan Am's current operating conditions better average performance for its passengers than would a policy of mixed male and female hiring" (pp. 6a-7a, *infra*).

8. ". . . no U.S. carrier was hiring males for the [steward-stewardess] position for which the plaintiff here applied [in 1967]" (p. 11a, *infra*).

---

* Although this corporate decision was made in 1959, Pan Am continued to hire male cabin attendants for its Latin American Division until 1965, due to the special requirements of that Division (see R. 102-04). After 1965, the decision to hire only female stewardesses was fully implemented on a system-wide basis.

9. ". . . Pan Am's passengers [male and female] overwhelmingly prefer to be served by female stewardesses" (p. 13a, *infra*).

10. ". . . an airplane cabin does indeed represent a unique environment in which an air carrier is required to take account of special psychological needs of its passengers. . . . [T]here are basic psychological reasons which explain that preference [of passengers for female stewardesses]" (pp. 15a-16a, *infra*).

11. ". . . because of the special nature of the flight attendant position, air carriers are forced to rely heavily on employment selection standards, training and motivation to produce high average performance by its [*sic*] cabin personnel" (p. 17a, *infra*).

12. ". . . at the time of the plaintiff's application for employment [April 1967] and at the time of trial [September 1969], there were few men who possessed the aggregate of personality characteristics which Pan Am was entitled to seek in its flight attendants; . . . it was not practically possible to identify in the hiring process those few men who did; . . . given the present requirements of the job, the admission of men to the hiring process, in the present state of the art of employment selection, would have increased the number of unsatisfactory employees hired, and reduced the average level of performance of Pan Am's flight attendants . . ." (pp. 19a-20a, *infra*).

13. ". . . the requirement that one be of the female sex was reasonably designed to improve the average performance of Pan Am's complement of flight attendants and was accordingly a bona fide occupational qualification reasonably necessary to the normal operation of Pan Am's business" (p. 20a, *infra*).

On the basis of these findings, the Court concluded that Pan Am's

> "policy of hiring only females for the flight attendant position was not an unlawful discrimination on the grounds of sex under Section 703 of Title VII of the Civil Rights Act of 1964" (p. 23a, *infra*).*

Final judgment dismissing the complaint was entered on April 24, 1970 (p. 24a, *infra*). A notice of appeal to the Court of Appeals was filed on May 25, 1970 (R. 837). Leave to proceed *in forma pauperis* was granted to appellant on July 6, 1970.

2. The Decision of the Court of Appeals

In the Court of Appeals, Pan Am urged that the District Court's findings of fact were controlling under Rule 52 of the Federal Rules of Civil Procedure unless "clearly erroneous," and that they were supported by overwhelming evidence. The Court of Appeals left the District Court's findings basically undisturbed, but reversed its judgment, as a matter of law, on the following grounds, and remanded the case for further proceedings consistent with its opinion:

> (a) it held that Section 703(e) of the Act permits exclusion of one or the other sex from hire "only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively" (p. 32a, *infra*);
>
> (b) it held that "the primary function of an airline is to transport passengers safely from one point to another," and that while the "non-mechanical" cabin attendant functions relied upon to justify the exclu-

* The District Court also found that Diaz was not individually qualified for the position, apart from his sex, but that the action was properly brought as a class action, and that Diaz was a proper representative of the class (p. 23a, *infra*).

sionary hiring policy (providing reassurance to passengers, offering courteous, personalized service, and making flights generally comfortable and pleasant)—which women apparently perform "in a more effective manner than most men"—"may all be important," they are not the "essence" of the airline business, but merely "tangential" to it (p. 32a, *infra*);

(c) it held that "since . . . the basis of exclusion [of males] is the ability to perform non-mechanical functions which we find to be tangential to what is 'reasonably *necessary*' for the business involved, the exclusion of *all* males because this is the *best* way to select the kind of personnel Pan Am desires simply cannot be justified" (pp. 33a-34a, *infra*);

(d) it held that "customer preference may be taken into account [as supporting a BFOQ exemption] only when it is based on the company's inability to perform the primary function or service it offers. . . . Pan Am argues that the customers' preferences are . . . based on . . . the ability of women stewardesses to better provide the non-mechanical aspects of the job. . . . Since these aspects are tangential to the business, the fact that customers prefer [female cabin attendants] cannot justify sex discrimination" (pp. 34a-35a, *infra*).

While the Court of Appeals was thus prepared to agree that the exclusion of men from the hiring pool results in better cabin attendants, better cabin service and more satisfied passengers, it held that the statute nevertheless prohibits such exclusion, on the basis of its own declaration that cabin service to passengers is not "the essence" of an airline business, although "it may . . . be important."*

* Even as the Court of Appeals was declaring that "safe transportation," not comfortable or pleasant transportation, constitutes "the essence" and "primary function" of an airline, most of the privately-owned railroads of the United States were preparing to abandon inter-city passenger service in favor of "Railpax" (now "Am-

This declaration was delivered *ex cathedra,* without any reference to any evidence in or out of the record; it is, moreover, inconsistent with the evidence of record and with District Court findings.*

Reasons for Granting the Writ

1. In holding that the BFOQ exemption created by Section 703(e) of the Act authorizes employment on the

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trak"), a quasi-governmental corporation (Pub. Law 91-518, 45 U.S.C. §§501 *et seq.*). This was occurring not because the railroads had been unable to transport passengers *safely,* but because of their notorious inability to make safe rail transportation sufficiently attractive to induce passengers to *use* it. Indeed, only four days after the Court's decision, one of the Railpax incorporators was announcing:

> "The airlines are about as advanced in passenger handling as any business today and they take their responsibility seriously.
>
> "We're determined to provide an atmosphere for the rail passenger that shows we want him—like the airlines do—and we're going to treat him like a valued person, like they do" (*New York Times,* April 11, 1971, p. 24).

See also an article on Railpax on page 39, *New York Times,* March 25, 1971, "A Railroad Euthanasia Plan?", by Tom Wicker, Associate Editor, reading in part:

> "But if Railpax service is to come anywhere near those goals, it is going to have to win back large numbers of riders who have given up trains in disgust at *discomfort, discourtesy,* inadequate schedules, ancient equipment and roller-coaster roadbeds. To do that will require fast, *comfortable* trains operating on frequent schedules over modern roadbeds, with computer ticketing and *at least the level of passenger service the airlines provide*" (italics supplied).

Congress, too, appears to have concluded that providing for passenger *comfort* is essential and not "merely tangential" to a viable transportation business. Section 1 of the Act creating Railpax recites in part:

> ". . . the public convenience and necessity require continuous improvement of such service to provide fast, *comfortable* transportation between crowded urban areas and in other areas of the country . . ." (45 U.S.C. §501; italics supplied).

* See, *e.g.,* R. 124-25, 132-33, 202-05; Pan Am Ex. 16, pp. 1243-48; District Court findings "3," "4," "6," "7" and "10," *supra* pp. 6-7.

basis of sex only where the "essence of the business operation would [otherwise] be undermined," the Court of Appeals has wrongly decided an important question of federal law having general application, which has not been, but should be, settled by this Court.

2. In ruling, as a matter of law, without reference to the evidence of record and the District Court's findings, that airline efforts to improve the comfort and satisfaction of passengers are "merely tangential" to airline operations and not of their "essence," the Court of Appeals has determined a federal question in a manner in conflict with this Court's holding in *Phillips* v. *Martin Marietta Corp.*, 27 L. Ed. 2d 613 (Jan. 25, 1971), to the effect that whether a sex requirement for hire is a "bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise" is "a matter of evidence" (*id.* at 616).

I

Section 703(e) of the Act permits hire on the basis of sex where "reasonably necessary to the normal operation of [a] particular business or enterprise." The Court of Appeals has read (or, as we view it, rewritten) that provision to mean that such hire must be "necessary to the essence or primary function of the business." In effect, the Court replaces the statutory words "normal operation" with its own words "essence" or "primary function." We submit that the Court's construction of Section 703(e), which the Court acknowledged was a "narrow reading" (p. 31a, *infra*), is plainly wrong. Whether right or wrong, however, it significantly affects a wide range of interests and situations:

(i) it affects every airline in the United States, all of which hire only females for the cabin attendant position (p. 11a, *infra*)*;

(ii) it affects tens of millions of airline passengers who, the Court of Appeals rules, must now be given inferior in-flight service in obedience to a statute which supposedly recognizes passenger safety as of the "essence," and relegates passenger comfort and peace of mind to the "merely tangential";

(iii) it affects every litigated case, in *every* industry, in which Section 703(e) is pleaded as a defense to a charge of discrimination in employment based on sex, religion or national origin; and

(iv) it affects many employment practices across the country, not yet the subject of litigation, which depend for their lawfulness upon the Section 703(e) exemption.

As a result of the decision below, an authoritative construction of Section 703(e) by this Court is, we submit, now required. Indeed, this Court's statement in *Phillips* v. *Martin Marietta Corp., supra,* that it is "a matter of evi-

* Thousands of new cabin attendants are hired each year by U.S. air carriers. Currently pending in the District Court for the Northern District of Georgia is *Schrichte* v. *Eastern Air Lines, Inc.*, Docket No. 12615, also involving a male applicant for a cabin attendant position. Similar cases are pending before the New York State Division of Human Rights (*McNeil* v. *Pan American World Airways, Inc.*, Case No. CS-12975-68) and the Massachusetts Commission Against Discrimination (*Corcoran* v. *Eastern Air Lines, Inc.*, Case Nos. 70-S-174, -200, -201).

We are informed that United Air Lines, Inc. intends to petition this Court for a writ of certiorari to review the recent decision of the Court of Appeals, Sixth Circuit, in *Sprogis* v. *United Air Lines, Inc.*, 3 CCH Employ. Prac. Dec. ¶8239 (June 16, 1971) (not yet officially reported); there, among other things, the Court dismissed on summary judgment United's §703(e) defense of its policy requiring its stewardesses (but not its Hawaiian stewards) to resign upon marriage.

dence'' whether a sex qualification for employment is permissible under the Section 703(e) standard (27 L. Ed. 2d at 616) confirms the need for a *prompt* definition by this Court of the substantive standards by which Section 703(e) defenses are to be tried, so that the evidence in cases now pending may be marshaled accordingly.*

II

The Court of Appeals' *ipse dixit,* that services directed to the comfort and satisfaction of passengers do not constitute part of the ''essence'' of Pan Am's business, warrants review here, even assuming that its construction of Section 703(e) was correct, and even if only those functions going to ''the essence'' can justify employment on the basis of sex. For the Court below ignored this Court's ruling in *Phillips* that determinations under Section 703(e) are ''matters of evidence,'' ignored the evidence adduced at the trial,** and treated the question—What is the ''essence''?—as one of law.

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* If the ruling below should stand, each §703(e) case would presumably involve an evidential trial as to "the essence" or "primary function" of the particular enterprise involved. For example, in a suit attacking a French restaurant for employing only cooks of French nationality, we presume the question would be whether the "essence" of that particular business consists simply of serving food prepared in a particular fashion, as distinguished from prepared and served in a French atmosphere. As to this case, see the Interpretive Memorandum of Senators Clark and Case, floor managers for the Civil Rights Bill, quoted in the District Court's opinion at pages 21a-22a, *infra.* 110 Cong. Rec. 7213 (1964).

** The record included the testimony of three industry witnesses with an aggregate of over 90 years of industry experience (see R. 76, 197; Pan Am Ex. 16, p. 1236) to the effect that making passengers feel comfortable and secure is necessary to the normal operation of an airline (see, *e.g.,* R. 98, 125, 132-33, 203-04, 214, 221, 231; Pan Am Ex. 16, pp. 1243-44). They testified that airline economic growth and viability has been directly related to airline ability to make passengers comfortable and satisfied when flying, both physically and

Even if the question were properly treated as one of law, the Court committed grave error. True, the "primary function" of a privately owned U.S. flag air carrier must include providing safe transportation, but it must just as surely include attempting to *make a profit* from the safe transportation provided. The record here was full of evidence (a) that airlines seek to attract passengers in order to make a profit, (b) that to attract passengers they attempt to make the flight cabin as comfortable and pleasant as possible, and(c) that they employ females as cabin attendants in order to provide better service in the cabins. Safe transportation is not everything—there is more than one ingredient to the "essence" of an airline.

Even if Section 703(e) is to be understood as concerned only with the "essence" of an enterprise, it must leave room to the enterprise to determine that "essence" for itself. Pan Am, like other U.S. air carriers, has defined its business to be one of providing both safe and pleasant air travel. To that end, Pan Am has made attentiveness to the com-

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psychologically, and thus more willing and desirous of flying (*e.g.*, *id.* at 1243-48); that to make flying more pleasurable, airlines have concentrated upon minimizing, so far as possible, the natural anxiety associated with being transported through the air strapped inside a metal tube (R. 221); that cabin attendants play a critical role in these efforts, their principal function being to see to it that passengers are comfortable and relaxed, and enjoy their flight as much as the limitations imposed by airline equipment and operations permit (*e.g.*, Pan Am Ex. 16, pp. 1243-44); that these functions have become *increasingly* important to airline operations because, among other things, (a) the "mix" of passengers has already changed from predominantly well-traveled men flying for work-related reasons to 50% tourists and families flying for pleasure and a 75% level is expected by 1975 (*id.* at 1270-71), (b) the public at large has come to expect a much higher level of comfort and service from the airlines than has been offered by the railroads (*id.* at 1264), and (c) the competition among airlines (R. 125, 203), between air travel and other forms of travel (Pan Am Ex. 16, pp. 1245-46, 1269), and between air travel and other forms of discretionary spending (*id.* at 1265; R. 125) is so intense.

fort and ease of passengers a primary function of its more than 3,000 cabin attendants. It was error for the Court of Appeals to rule that this function was "merely tangential," since the function was not "tangential" to the business *Pan Am* had determined to operate. An airline, we submit, is not barred by Section 703 of the Act from taking reasonable and effective steps to improve the level at which that function is performed.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

No. 69-206-Civ.

CELIO DIAZ, JR., individually and on behalf of all others similarly situated,

Plaintiff,

v.

PAN AMERICAN WORLD AIRWAYS, INC., a New York corporation licensed to do business in the State of Florida,

Defendant.

MEMORANDUM OPINION

FULTON, Chief Judge.

This is an individual and class action for an injunction and damages under Section 706(f) of Title VII of the Civil Rights Act of 1964 (the "Act"), 42 U.S.C. §2000e-5(f), and under Rule 23 (b) (2) of the Federal Rules of Civil Procedure. It presents for judicial decision for the first time the interesting question of whether an airline violates the sex discrimination provisions of Section 703(a) of the Act, 42 U.S.C. §2000e-2(a), in following a policy of hiring only persons of the female sex as flight cabin attendants.

Section 703 of the Act provides, in part:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

* * *

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *."

At the Court's pretrial conference, it was stipulated that the defendant, Pan American World Airways, Inc. ("Pan Am"), has, for a number of years, followed a policy of hiring only females as flight attendants, and that plaintiff's application for employment was rejected pursuant to that policy on April 17, 1967. It was further stipulated that Pan Am's "females only" hiring policy is prohibited by Section 703(a) (1) unless being a female is, in respect of the position for which plaintiff applied, "a bona fide occupational qualification reasonably necessary to the normal operation" of Pan Am's business within the meaning of subparagraph (e) of that Section.

The stipulation left as the controlling issue to be tried the question of whether being a female was in fact such a

bona fide occupational qualification for that position.[1] At the commencement of the trial, the Court ruled that Pan Am had the burden of proof on that issue. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). A considerable body of evidence was then offered on that subject, including a history and evaluation of the use of both male and female flight attendants on U. S. carriers for a period of over 40 years.[2]

At the close of the trial, motions for leave to file post-trial briefs as friends of the Court were filed on behalf of interested agencies and organizations: the Equal Employment Opportunity Commission ("EEOC"); the Air Transport Association of America ("ATA"), on behalf of itself and its members comprising nearly all scheduled air carriers certificated by the Civil Aeronautics Board; and the Transport Workers Union of America, AFL-CIO ("TWU"), a labor organization representing flight attendants on Pan Am and other United States air carriers. The EEOC and TWU briefs argued, as did the plaintiff's, that no bona fide occupational qualification exception could be or had been shown. The ATA brief argued in support of Pan Am's contrary position. These briefs *amicus curiae*

1. Pan Am also put in issue the question of whether plaintiff would have been qualified for hire in the absence of its policy of hiring only females. That issue is dealt with briefly below.

2. In addition to the witnesses offered at the trial, the plaintiff's attorney was provided with (1) the transcript of an administrative hearing held on the issue by the federal Equal Employment Opportunity Commission in September, 1967 [see Air Transport Ass'n. of America v. Hernandez, 264 F.Supp. 227, modified, 55 CCH Lab.Cas. ¶9062 (D.D.C. 1967)], which had issued its own interpretive opinion on the issue [33 Fed.Reg. 3361 (Feb. 21, 1968)], and (2) the transcripts of subsequent hearings on the same issue before the New York State Division for Human Rights. Portions of the records before both agencies were, by stipulation, made part of the record before this Court.

and the briefs for the parties have proved helpful to the Court.

The Court is satisfied that the issues have had a full and fair hearing. The Court herewith confirms, pursuant to Rule 23 of the Federal Rules of Civil Procedure, its approval of the action in accordance with the pretrial stipulation of the parties as a class action in behalf of males who have applied within the United States for positions as Pan Am Flight attendants and have been rejected because of their sex. The Court likewise finds, in accordance with the party's pretrial stipulation, that the plaintiff completed the procedural and administrative prerequisites necessary to institute an action under Title VII of the Act.

Being a Female Was a Bona Fide Occupational Qualification

Having considered the briefs, the arguments and the evidence, the Court finds that at the time of the plaintiff's application for employment as a flight attendant with Pan Am (April 1967), and at the time of trial (September 1969), being a female was a bona fide occupational qualification for hire as a flight attendant on Pan Am, and that Pan Am's policy of hiring only females for that position was accordingly not an unlawful discrimination on the grounds of sex under Section 703 of Title VII of the Civil Rights Act of 1964.[3] Since this finding is derived in part

3. Pan Am's flight attendants are divided by their union contract with TWU into two classes: (1) stewards and stewardesses; and (2) pursers. Pursers have supervisory functions in respect of stewards and stewardesses and a somewhat different set of duties. Initial hire has always been at the steward-stewardess level. Pursers have always been promoted from the steward-stewardess ranks. Since Pan

from the history of the changing functions of the position of flight attendant, corresponding to changes in the equipment, technology and operating environment of the United States airline industry, I shall summarize the pertinent facts of that history as abundantly disclosed by the evidence.

HISTORY OF USE OF FLIGHT ATTENDANTS

Pan Am is charged with unlawful discrimination because it now hires only females as flight attendants. There is, of course, no charge that Pan Am is corporately "prejudiced" against males as employees. In fact, of its nearly 40,000 employees, four-fifths are male. Moreover, the evidence showed that at the time plaintiff was rejected for a flight attendant position in Miami on the ground that he was a male, Pan Am had other positions available to males in Miami which paid at least as well as the flight attendant position, and that if plaintiff had met all of Pan Am's qualifications other than sex for the flight attendant position, he would also have been qualified for the other positions. It further appears that Pan Am hired males as cabin attendants from the late 1920's until 1965, and was, in fact, the last major U. S. carrier to exclude males from hire for the flight attendant position.

The plaintiff refers to Pan Am's hiring of male flight attendants at an earlier stage of its history as evidence that men can now satisfactorily perform the duties of the

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Am does not hire pursers, the plaintiff's application was necessarily for the position of steward-stewardess. The issue presented, narrowly stated, is whether being a female is a bona fide occupational qualification for the steward-stewardess position. The Court's finding is limited to that issue.

position. Pan Am argues, however, that its history has a deeper and less simplistic significance. It points to its prior policy of hiring men as demonstrating that its current, different policy, initially adopted with the coming of jets in 1959, is not based upon "stereotyped" thinking or "myths", as the EEOC here suggests, but is, rather, simply the latest of a series of pragmatic judgments, each a response to the changing airline operating environment, and based upon a wealth of actual operating experience. Pan Am argues that given its current equipment, route structure, passenger "mix", available personnel selection techniques, and its current definition of the "priority" functions of its flight attendants, the "females only" hiring policy will yield better over-all performance of flight attendant functions by its cabin personnel than a policy which would make both males and females eligible for the position. In this connection, the ATA emphasizes that the airline industry is characterized by continuous changes in the operating environment of its individual carrier members; that in order to maintain a high level of service to the public, each carrier should be free to define and redefine the substantive functions and objectives of its flight attendants, corresponding to particular changes in its own operating environment, to fix the level of performance desired on its airline in respect of each of those functions, and "to fix, on the basis of the employer's own experience, qualifications for the job, including a qualification as to sex, reasonably calculated to yield such performance" (ATA Brief *Amicus Curiae,* P. 6). The Court is satisfied on the basis of the evidence here that Pan Am's current

hiring policy is in fact the result of just such a pragmatic process as the ATA describes, representing a judgment made upon adequate evidence acquired through Pan Am's own considerable experience, and designed to yield under Pan Am's current operating conditions better average performance for its passengers than would a policy of mixed male and female hiring.

Pan Am passenger operations began more than forty years ago with over-water flying from Miami to the Caribbean and Latin America. The trips were mostly by relatively slow seaplanes and were, consequently, long and arduous. Most passengers were men, to whom flying was still a physical adventure. Flight attendants' duties involved heavy physical labor, including mooring the aircraft at sea dockings, loading and unloading commissary equipment and baggage, and carrying back the food purchased at local market places. From this period until World War II, through Pan Am's inauguration of trans-Atlantic and trans-Pacific air travel in the 1930's and the era of the "flying boats", Pan Am's flight attendants were all men.

Most U. S. domestic airlines, having different route structures from Pan Am, employing land-based equipment, and operating in a different overall environment, made a different personnel choice in the 1930's. Urged by the Government (which had been paying heavy subsidies) to make their passenger business self-supporting, they adopted a program of attracting passengers by improved in-cabin comfort and service and by reducing passenger apprehension about flying. To that end a number of carriers, including United Airlines, American Airlines, TWA and National Airlines, began in the 1930's to employ all-female

cabin crews. Eastern Air Lines on the other hand, with a route structure requiring stops at a number of relatively small stations not manned by local ground personnel, was forced (like Pan Am) to assign baggage handling duties to its flight attendants, and (like Pan Am) at first employed only male stewards.

With the coming of World War II, and the rapid construction and improvement of overseas airfields, Pan Am became progressively more able to use land-based aircraft. This permitted the elimination of some of the physical requirements which had dictated the earlier employment of male flight attendants. At the same time, the demands of the military services made it more difficult to find qualified males. Pan Am, accordingly, began in 1944 to add female stewardesses to its crews, and this mixed hiring pattern continued for the next 15 years, during which both stewards and stewardesses were covered by the same union contract, which placed them on a single seniority list and made no distinction in their duties.

During those 15 years, there were significant changes in Pan Am's operating environment which finally produced a change in Pan Am hiring policy in 1959. From 1944 to 1959, aircraft became faster, bigger and safer, and were capable of providing more of the amenities to passengers; flight frequency increased; the passenger "mix" changed —instead of planes filled with businessmen and military men, overseas flying attracted and was designed to attract increasing proportions of tourists, "first-time" travellers, women, children and babies. As ground facilities improved, the flight attendant's duties involving physical labor on the ground and dealings with local government au-

thorities were gradually eliminated. These changes in turn produced a change in the in-flight needs of passengers, a shifting emphasis in the carrier-established objectives and priorities of passenger service, and a redefinition of cabin attendant functions in terms of the new objectives and priorities. The prime function of the cabin attendant, as the job was defined by Pan Am with the introduction of the jets in 1958, became to provide passengers, so far as possible, with friendly personalized service, to instill a sense of comfort and well-being in flight, and to provide maximum reassurance to the new "mix" of travellers Pan Am was carrying.

Reviewing its own experience with the thousands of male and female cabin attendants it had hired over the preceding years, Pan Am determined in 1959 that the overall level of service provided by the females it had hired was superior to that provided by the males it had hired. While the males were found capable of satisfactorily performing what Pan Am (like other airlines) describes as the "mechanical" functions of the flight attendant's job, such as the stowage of coats and the preparation and service of meals and beverages, the male stewards were found, as a group, not to be the equal of the females in the "non-mechanical" functions which had now become more important—providing reassurance to anxious passengers, giving courteous personalized service, and in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations. Both sets of duties had to be performed with relatively little supervision, under conditions in which a high degree of personal motivation was required for a high level of performance. Despite its

best efforts to select the most qualified and motivated individual stewards and stewardesses, Pan Am had found that of the thousands it had hired over the years, the males generally proved to be not as well qualified or motivated to perform their non-mechanical functions as the females it hired. Consequently, it found that there was a significant statistical probability that a new-hire stewardess would make a better cabin attendant than a new-hire steward.

Accordingly, Pan Am, in 1959, in order to improve the average level of service on its airline for the jet age, and on the basis of the experience just described, adopted a new hiring policy applicable to all of its operations except its Latin American Division: It determined to hire only female stewardesses.[4] The exception then made for the Latin American Division was consistent with Pan Am's prior history. The Latin American Division was slower in relieving flight attendants of responsibilities for performance of ground duties, including the handling of customs and immigration matters, and it was slower in phasing in jet equipment. In 1965, the "females only" hiring policy became uniform throughout the Pan Am system, and was in effect in Pan Am's hiring facility in Miami in April 1967 when the plaintiff applied and was rejected for a flight attendant position.

In moving from a mixed hiring policy to one for females only, Pan Am followed the same path as the other U. S. carriers, all of whom appeared to have had the same experience in using male flight attendants. Eastern, which

4. The males theretofore hired were not discharged, but were kept on in their jobs, their number being progressively reduced by attrition.

had hired males and females for many years, found that its stewardesses were better motivated to provide personalized service and stopped hiring men in 1958. Braniff found that the men it employed on its domestic flights did not, as a group, perform satisfactorily, and stopped hiring them in 1953.[5]

Delta had used men from 1946 to 1948 on the DC-4, but found that they did not perform as well as the females, and discontinued the hiring of men. Allegheny, Frontier, and Piedmont had each assigned baggage-handling duties to their flight attendants, and consequently used men; as those duties were eliminated, the men were replaced by women. Other airlines had comparable experiences. At the time of trial, no U. S. carrier hired males as flight attendants, except for limited situations in which the attendant had special assigned duties which were thought to be consistent with male attributes.[6]

As a result of these hiring policies on U. S. carriers, some 96% of the more than 23,000 flight attendants employed in the industry in 1967 were women, and no U. S. carrier was hiring males for the position for which the plaintiff here applied.[7]

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5. Braniff still carries male pursers on its South American routes to deal with customs and immigration problems in South American ports of call.

6. United employed Hawaiian stewards to provide local color on its Hawaiian flights, and TWA and Braniff employed males as pursers in charge of the cabin on international flights. TWA and Braniff hire only women for the steward-stewardess position for which plaintiff applied on Pan Am.

7. Evidence was offered that a number of foreign flag carriers employ male as well as female cabin attendants, although some foreign flag carriers do not employ males. It appeared that most of the foreign carriers who employ both males and females assign differing

PASSENGER PREFERENCE

As noted above, a number of U. S. airlines have employed male as well as female flight attendants. They have, accordingly, been in a specially advantageous position to observe and evaluate passenger reaction. Two such airlines, Pan Am and Eastern, offered evidence to the Court. They each reported that on the basis of their own surveys and analyses of passenger reaction, their passengers overwhelmingly preferred to be served by female flight attendants.

Those judgments, so far as the evidence goes, were, like many management judgments, not based on carefully controlled scientific studies, but upon the daily experience and observation of knowledgeable managers. Following the passage of the Civil Rights Act of 1964, the Air Transport Association of America undertook to make a more "scientific" analysis of passenger preferences: it commissioned the Opinion Research Corporation of Princeton, New Jersey, to make an independent survey on this subject. That survey was admitted into evidence by stipulation. While the Court does not accept this survey as exact in all its particulars, the survey does tend strongly to confirm the general findings of Pan Am and Eastern that they please

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aggregates of duties to each sex, and that the male's cabin attendant job of such foreign airlines is generally not the exact equivalent of a stewardess's job on Pan Am. Moreover, it appeared that those carriers' hiring policies may be influenced by their special passenger "mix", corporate objectives, and national cultures. The fact that foreign flag airlines, operating in a different overall environment from Pan Am, may be prepared to employ males as cabin attendants does not meet Pan Am's evidence, based on its own experience with its own operating environment, as to the relative performance of male and female flight attendants.

a much larger proportion of their passengers by limiting their hiring to females. According to the survey, 79% of the passengers surveyed, male and female, prefer being served by a female stewardess to a male steward, 18% have no preference, and 3% prefer males; among female passengers, 69% preferred stewardesses to stewards, 26% had no preference, and only 5% preferred stewards; among male passengers, 85% preferred stewardesses, 14% had no preference, and only 2% preferred stewards.[8] It has been argued to the Court that an airline may not lawfully take its passengers' preferences into account in establishing a hiring policy based on sex. That presents a question of statutory interpretation and is dealt with below. Putting aside for the moment the question of legal relevance, the Court finds as a matter of fact that Pan Am's passengers overwhelmingly prefer to be served by female stewardesses.

Pan Am sought, through a psychiatrist, Dr. Eric Berne, author of the "Structure and Dynamics of Organizations and Groups", to explain in psychological terms why, as the other evidence indicated, most airline passengers of

8. These statistics provided by the survey relate to the passenger's overall preference in respect of the flight attendant's performance of the entire job. The survey further examined passenger preference in respect of particular portions of the flight attendant's job, and yielded, not surprisingly, varying but interesting results in respect of each separate portion. Thus, in respect of the flight attendant's efforts to relieve tension "if the flight is rough", 61% of all passengers preferred stewardesses, 15% preferred stewards, and 24% had no preference. In an actual emergency, however, only 25% would prefer stewardesses, 54% would prefer stewards, and 24% would have no preference. After a series of questions addressed to different portions of the flight attendant job, passengers were again asked to evaluate their overall preference, and again overwhelmingly expressed a preference for stewardesses.

both sexes prefer to be served by female stewardesses. There was no challenge to Dr. Berne's qualifications as an expert, and the Court found a considerable part of his testimony persuasive. Dr. Berne explained that the cabin of a modern airliner is, for passengers, a special and unique psychological environment ("sealed enclave") characterized by the confinement of a number of people together in an enclosed and limited space, by their being subjected to the unusual physical experience of being levitated off the ground and transported through the atmosphere at high speed, by their being substantially out of touch with their accustomed world, and by their own inability to control events. That environment, said Dr. Berne, creates three typical passenger emotional states with which the air carrier must deal; first and most important, a sense of apprehension; second, a sense of boredom; and third, a feeling of excitement. Dr. Berne expressed the opinion that female stewardesses, because of the nature of their psychological relationship as females to persons of both sexes, would be better able to deal with each of these psychological states. He specially emphasized, however, that the relief of passenger anxiety, due to apprehended but non-imminent dangers, represents the most important psychological factor to be dealt with by airlines, and that females are themselves psychologically better suited for that role than males because passengers of both sexes would, in this context, respond better to the presence of females than males. He explained that many male passengers would subconsciously resent a male flight attendant perceived as more masculine than they, but respond negatively to a male flight attendant perceived as less masculine, where

as male passengers would generally feel themselves more masculine and thus more at ease in the presence of a young female attendant. He further explained that female passengers might consider personal overtures by male attendants as intrusive and inappropriate, while at the same time welcoming the attentions and conversation of another woman. He concluded that there are sound psychological reasons for the general preference of airline passengers for female flight attendants.

This testimony of Dr. Berne was substantially the same as testimony he had given on the same subject in a proceeding before the New York State Division for Human Rights (McNeil v. Pan American World Airways, Inc., Commission Case No. CS-12975-68) which, like his testimony before this Court, was subject to cross-examination, albeit in that case, cross-examination was by the attorney for the Commission. A copy of that testimony, admitted as an exhibit in this proceeding, was made available to the plaintiff's counsel some months in advance of the trial of this case. In the face of this notice, plaintiff failed to produce any significant evidence challenging Dr. Berne's conclusions; the plaintiff's psychologist did no more on this point than urge that Dr. Berne's view that an aircraft cabin is a special environment rests on something less than adequate data. On the basis of Dr. Berne's testimony and common sense, and on the basis of testimony by industry witnesses who described the problems of passenger apprehension, experienced over many decades, this Court finds that an airplane cabin does indeed represent a unique environment in which an air carrier is required to take account of special psychological needs of its passengers. On

the record, therefore, the Court must find not only that under the conditions of modern air travel most Pan Am passengers do in fact prefer female stewardesses to male stewards, but also that there are basic psychological reasons which explain that preference.

The Actualities of the Hiring Process

By itself, the fact that females perform better as flight attendants than do males, on the average, would by no means justify the exclusion of all males from the hiring process. If it were practicable during the course of the hiring process to select individual males who would perform at the level expected of female attendants, and whom passengers would accept as performing at as satisfactory a level, Section 703 of the Act would clearly require that selection for hire be made on an individual basis, and that males be permitted to enter the hiring process and be judged on their individual merits, even though most males might be rejected during the process. Indeed, unless it is highly impracticable to select employees on an individual basis, consistent with legitimate employment objectives, any refusal to hire males or females as a class for any particular position would violate the Act. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n. 5 (5th Cir. 1969). Recognizing this fact, Pan Am undertook to demonstrate that it is not practicable, without downgrading average flight attendant performance on its aircraft, to admit males to the hiring process.

Pan Am points to the actualities of the hiring process itself imposed by the nature of the particular employment;

it hires some 1,000 new flight attendants a year; to obtain the quality of employee it desires in that number, it uses teams of interviewers, who actually interview 25,000 to 30,000 applicants a year; those interviews are not conducted in psychological testing laboratories, but in Pan Am offices across the country, on scores of college campuses and hotel suites in scores of U. S. and foreign cities, including Paris, London, Amsterdam, Stockholm, Helsinki and so on. The evidence further showed that an employee selected for hire is then given a six-week course at a training school operated by Pan Am; that it is only after the completion of the expensive training process that employees can be sent out to work "on the line", prior to which, of course, there is no opportunity to observe the employee under actual working conditions; and finally, that even after an employee has begun work "on the line", there is very little supervision, and evaluation of any given individual's level of performance is extremely difficult. The Court is satisfied that because of the special nature of the flight attendant position, air carriers are forced to rely heavily on employment selection standards, training and motivation to produce high average performance by its cabin personnel.

Pan Am offered evidence as to the personal qualifications conducive to the optimum performance of the flight attendant's function, as Pan Am currently defines it, and as to the difficulties of determining whether individual applicants have those qualities. This included testimony by its own management and by officials of Eastern and United Air Lines. It also included testimony by Dr. Raymond A. Katzell, an industrial psychologist, Chairman of the De-

partment of Psychology of New York University, past President of the Division of Industrial Psychology of the American Psychological Association, co-author of *Testing and Fair Employment* (N.Y.U. Press 1968), and a frequent consultant to government agencies and industrial institutions in his specialty. Dr. Katzell defined that specialty as the analysis of the factors which affect the work motivation and performance level of employees, and the pursuit of methods of fixing employment qualifications which will increase the probability that the employee selected for hire will perform "at a high level", and reduce the probability "of failure or poor performance." Noting that the flight attendant's work involves not only a "mechanical" aspect but an "intangible" aspect concerned with those "interpersonal activities" which are designed to contribute to passenger comfort and a physical and psychological sense of well-being, and noting that the work was performed without supervision, Dr. Katzell stated that a high level of job performance requires not only mechanical competence but also sincere interest and motivation in providing for the comfort and ease of others in the working environment of that position. Dr. Katzell concluded that the aggregate of separate personal characteristics which would produce such interest and motivation constitute what we commonly describe as "femininity"; that while some men possess one or more of these qualities (e.g., benevolence, genuine interest in the comfort of others, lack of perceived aggressiveness) to a greater degree than some women, or even than most women, "it would be quite infrequent to find a man possessing each of these traits to at least as high a degree as the average woman"; that while it may

in theory be possible to determine which individual male applicants for employment are among the few who possess the aggregate of those traits to a satisfactory level, it is not possible to make such individual determinations in any reliable way in the actual pre-employment situation with the psychological or personality testing methods now available; that the best available initial test for determining whether a particular applicant for employment is likely to have the personality characteristics conducive to high-level performance of the flight attendant's job as currently defined is consequently the applicant's biological sex; that to eliminate the female sex qualification would simply eliminate the best available tool for screening out applicants likely to be unsatisfactory and thus reduce the average level of performance.

The Court was impressed with this expert testimony and analysis, particularly since it was confirmed by the actual experience of Pan Am and Eastern that the male stewards whom they did hire, until recent years, and who therefore survived a selection process which did not exclude males, did not perform as well as the females selected in the same process. The Court further notes the Pan Am and United testimony that those airlines have tried and abandoned previously available psychological tests as inadequate for testing the personality characteristics of applicants for the cabin attendant position, and that the industry is nevertheless continuing its efforts to find or develop suitable tests.

On the basis of this and other evidence, the Court finds that at the time of the plaintiff's application for employment and at the time of trial, there were few men who possessed the aggregate of personality characteristics

which Pan Am was entitled to seek in its flight attendants; that it was not practically possible to identify in the hiring process those few men who did; that given the present requirements of the job, the admission of men to the hiring process, in the present state of the art of employment selection, would have increased the number of unsatisfactory employees hired, and reduced the average level of performance of Pan Am's flight attendants; and that the requirement that one be of the female sex was reasonably designed to improve the average performance of Pan Am's complement of flight attendants and was accordingly a bona fide occupational qualification reasonably necessary to the normal operation of Pan Am's business.

The Statute Permits Employment Qualifications Based on Sex

The EEOC has suggested that findings such as this Court has made upon the evidence here does not justify Pan Am's refusal to hire males as a class, arguing that the statute requires that employment selection be made on an individual basis, and that persons of one or another sex may not be excluded as a class. (See also EEOC "Guidelines on Discrimination Because of Sex", §1604, 30 Fed. Reg. 14926, as amended 33 Fed.Reg. 3344, 34 Fed.Reg. 13367).[9] The EEOC also argues that passenger preference for flight attendants of a particular sex cannot justify an airline's restriction of employment opportunities to that sex.

The EEOC is the agency charged with initial review of complaints under Title VII of the Act, and its

9. Title VII does not give the EEOC general authority to issue substantive regulations.

views are entitled to deference by this Court. But the Court of Appeals for this Circuit has already indicated that where it is highly impracticable or impossible for an employer to determine bona fide qualifications for employment except on the basis of sex, as this Court has found to be the fact here, an employer may make sex a qualification for employment. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n. 5 (5th Cir. 1969). And since the Court, not the EEOC, has the final responsibility for making findings of fact and for interpreting the statute in this action under Section 706, which must be tried here *de novo,* the Court cannot in justice accept the EEOC's interpretation which it finds to be inconsistent with the statutory language and the legislative history. The Court believes that the "bona fide occupational qualification" exception made by Section 703 for religion, sex, or national origin (but not for race or color) was consciously and deliberately intended by Congress to permit employers to establish general job qualifications based on one or more of those factors—and not necessarily related to basic job skills—in the very limited circumstances defined by subparagraph (e) of that Section. This was made very clear by Senators Clark and Case, the floor managers for the Civil Rights Bill in the Senate, in their formal "Interpretive Memorandum" submitted to the Senate during the debate,[10] which explained the exception as follows:

> "* * * [The Section] creates certain limited exceptions from these prohibitions [of section 703]. First, it would not be an unlawful employment practice to

10. There was no Committee report in the Senate, the bill having been referred directly to the Senate floor after passage by the House.

> hire or employ employees of a particular religion, sex, or national origin in those situations where religion, sex, or national origin is a bona fide occupational qualification for the job. *This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence.* This exception is a limited right to discriminate on the basis of religion, sex or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion * * *'' (110 Cong. Rec. 7213; emphasis supplied).

The clear import of this legislative history is that customer preference can provide a basis for an employer's selecting employees on the basis of their sex where the preference is a legitimate one, related to differences in the ways in which the work will be performed by persons of different sexes, and the manner in which such performance will be received by the customer because of such differences. It is suggested that such recognition of customer preference on grounds of sex will open the door to legitimatizing discrimination on grounds of race or color on the excuse of customer prejudice or preference. The short answer to this objection is that Congress has indicated that customer preference may be considered under the limited "bona fide occupational qualification" exception to the general prohibition against discrimination on grounds of sex, but that Congress did not include any such exception

to its general prohibition against discrimination on grounds of race or color. Indeed, it would be constitutionally impermissible to recognize any employment qualification based on race or color. Colorado Anti-Discrimination Comm. v. Continental Airlines, 372 U.S. 714, 721, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963).

Conclusion

In view of all the foregoing, this Court concludes that defendant Pan Am's policy of hiring only females for the flight attendant position was not an unlawful discrimination on the grounds of sex under Section 703 of Title VII of the Civil Rights Act of 1964.

The Court further finds and concludes that plaintiff was not individually qualified for the position of Pan Am flight attendant, apart from his sex. Pan Am's general age qualification for hire for the position in April, 1967 was 26 years of age; the plaintiff was 30. Although Pan Am sometimes waived its hiring age requirements in cases where applicants possessed outstanding qualifications in other areas, it does not appear that plaintiff was thus specially favored. The plaintiff's lack of personal qualifications for the position does not, however, affect his standing to maintain this action as a class action for an injunction. However, since the class action has no merit, it must be dismissed.

This Memorandum Opinion shall serve in lieu of separate findings of fact and conclusions of law in this case. Counsel for Pan Am are hereby directed to submit an appropriate form of judgment in conformity with this Memorandum Opinion within ten (10) days of the date of entry hereof.

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

No. 69-206-Civ-CF

CELIO DIAZ, JR.,
Plaintiff-Appellant,

versus

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellee.

JUDGMENT

THIS ACTION came on for trial before the Court, Honorable Charles B. Fulton, Chief District Judge, presiding, and the issues having been duly tried, and the Court having filed, on April 9, 1970, its Memorandum Opinion in lieu of Findings of Fact and Conclusions of Law, it is hereby

ADJUDGED AND DECREED:

1. That Defendant's policy of hiring only females for the position of airline flight attendant, was not, at least until the termination of the trial of this action, an unlawful discrimination on the grounds of sex under Section 703 of Title VII of the Civil Rights Act of 1964; and

2. That this action is a proper class action, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of a class consisting of all males who have applied

within the United States for employment with Defendant as airline flight attendants and have been rejected because of their sex; and it is further

ORDERED, ADJUDGED AND DECREED:

That this action, both in respect to the plaintiff, individually and in respect to the aforesaid class of persons, be, and the same hereby is, dismissed on the merits, and that the Defendant may recover from the Plaintiff its costs, not including attorney's fees.

Dated: April 24, 1970

Charles B. Fulton
Chief Judge, U.S. District Court

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30098

CELIO DIAZ, JR.,
Plaintiff-Appellant,

versus

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

(April 6, 1971)

Before TUTTLE, AINSWORTH and SIMPSON, Circuit Judges

TUTTLE, Circuit Judge: This appeal presents the important question of whether Pan American Airlines' refusal to hire appellant and his class of males solely on the basis of their sex violates §703 (a)(1) of Title VII of the 1964 Civil Rights Act. Because we feel that being a female is not a "bona fide occupational qualification" for the job of flight cabin attendant, appellee's refusal to hire appellant's

class solely because of their sex, does constitute a violation of the Act.

The facts in this case are not in dispute. Celio Diaz applied for a job as flight cabin attendant with Pan American Airlines in 1967. He was rejected because Pan Am had a policy of restricting its hiring for that position to females. He then filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that Pan Am had unlawfully discriminated against him on the grounds of sex. The Commission found probable cause to believe his charge, but was unable to resolve the matter through conciliation with Pan Am. Diaz next filed a class action in the United States District Court for the Southern District of Florida on behalf of himself and others similarly situated, alleging that Pan Am had violated Section 703 of the 1964 Civil Rights Act by refusing to employ him on the basis of his sex; he sought an injunction and damages.

Pan Am admitted that it had a policy of restricting its hiring for the cabin attendant position to females. Thus, both parties stipulated that the primary issue for the District Court was whether, for the job of flight cabin attendant, being a female is a "bona fide occupational qualification (hereafter BFOQ) reasonably necessary to the normal operation" of Pan American's business.

The trial court found that being a female was a BFOQ. Before discussing its findings in detail, however, it is necessary to set forth the framework within which we view this case.

Section 703(a) of the 1964 Civil Rights Act provides, in part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin * * *

The scope of this section is qualified by §703(e) which states:

(e) Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Since it has been admitted that appellee has discriminated on the basis of sex, the result in this case, turns, in effect, on the construction given to this exception.

We note, at the outset, that there is little legislative history to guide our interpretation. The amendment adding the word "sex" to "race, color, religion and national origin" was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engen-

dered little relevant debate. In attempting to read Congress' intent in these circumstances, however, it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women. Indeed, as this court in *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 at 235 clearly stated, the purpose of the Act was to provide a foundation in the law for the principle of nondiscrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals.

Attainment of this goal, however, is, as stated above, limited by the bona fide occupational qualification exception in section 703(e). In construing this provision, we feel, as did the court in *Weeks, supra*, that it would be totally anomalous to do so in a manner that would, in effect, permit the exception to swallow the rule. Thus, we adopt the EEOC guidelines which state that "the Commission believes that the bona fide occupational qualification as to sex should be interpreted narrowly." 29 CFR 1604.1(a). Indeed, close scrutiny of the language of this exception compels this result. As one commentator has noted:

> "The sentence contains several restrictive adjectives and phrases: it applies only *'in those certain instances'* where there are *'bona fide'* qualifications *'reasonably necessary'* to the operation of that *'particular'* enterprise. The care with which Congress has

> chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening the kind of enormous gap in the law which would exist if [for example] an employer could legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group. Absent much more explicit language, such a broad exception should not be assumed for it would largely emasculate the act. (emphasis added) 65 Mich. L. Rev. (1966).

Thus, it is with this orientation that we now examine the trial court's decision. Its conclusion was based upon (1) its view of Pan Am's history of the use of flight attendants; (2) passenger preference; (3) basic psychological reasons for the preference; and (4) the actualities of the hiring process.

Having reviewed the evidence submitted by Pan American regarding its own experience with both female and male cabin attendants it had hired over the years, the trial court found that Pan Am's current hiring policy was the result of a pragmatic process, "representing a judgment made upon adequate evidence acquired through Pan Am's considerable experience, and designed to yield under Pan Am's current operating conditions better *average* performance for its passengers than would a policy of mixed male and female hiring" (emphasis added). The performance of female attendants was *better* in the sense that they were *superior* in such non-mechanical aspects of the job as "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as

pleasurable as possible within the limitations imposed by aircraft operations."

The trial court also found that Pan Am's passengers overwhelmingly preferred to be served by female stewardesses. Moreover, on the basis of the expert testimony of a psychiatrist, the court found that an airplane cabin represents a unique environment in which an air carrier is required to take account of the special psychological needs of its passengers. These psychological needs are better attended to by females. This is not to say that there are no males who would not have the necessary qualities to perform these non-mechanical functions, but the trial court found that the actualities of the hiring process would make it more difficult to find these few males. Indeed, "the admission of men to the hiring process, in the present state of the art of employment selection, would have increased the number of unsatisfactory employees hired, and reduced the average levels of performance of Pan Am's complement of flight attendants. . . ." In what appears to be a summation of the difficulties which the trial court found would follow from admitting males to this job the court said "that to eliminate the female sex qualification would simply eliminate the *best* available tool for screening out applicants *likely* to be unsatisfactory and thus reduce the *average* level of performance." (emphasis added)

Because of the narrow reading we give to section 703(e), we do not feel that these findings justify the discrimination practiced by Pan Am.

We begin with the proposition that the use of the word "necessary" in section 703(e) requires that we apply a

business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.

The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as, according to the finding of the trial court, their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another. Indeed the record discloses that many airlines including Pan Am have utilized both men and women flight cabin attendants in the past and Pan Am, even at the time of this suit, has 283 male stewards employed on some of its foreign flights.

We do not mean to imply, of course, that Pan Am cannot take into consideration the ability of *individuals* to perform the non-mechanical functions of the job. What we hold is that because the non-mechanical aspects of the job of flight cabin attendant are not "reasonably necessary to the normal operation" of Pan Am's business, Pan Am cannot exclude *all* males simply because *most* males may not perform adequately.

Appellees argue, however, that in so doing they have complied with the rule in *Weeks*. In that case, the court stated:

> We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. *Id.* at 235

We do not agree that in this case "all or substantially all men" have been shown to be inadequate and, in any event, in *Weeks,* the job that most women supposedly could not do was necessary to the normal operation of the business. Indeed, the inability of switchman to perform his or her job could cause the telephone system to break down. This is of an entirely different magnitude than a male steward who is perhaps not as soothing on a flight as a female stewardess.

Appellees also argue, and the trial court found, that because of the actualities of the hiring process, "the *best* available initial test for determining whether a particular applicant for employment is likely to have the personality characteristics conducive to high-level performance of the flight attendant's job as currently defined is consequently the applicant's biological sex." Indeed, the trial court found that it was simply not practicable to find the few males that would perform properly.

We do not feel that this alone justifies discriminating against all males. Since, as stated above, the basis of exclusion is the ability to perform non-mechanical functions which we find to be tangential to what is "reasonably *nec-*

essary" for the business involved, the exclusion of *all* males because this is the *best* way to select the kind of personnel Pan Am desires simply cannot be justified. Before sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are *necessary* to the business, not merely tangential.

Similarly, we do not feel that the fact that Pan Am's passengers prefer female stewardesses should alter our judgment. On this subject, EEOC guidelines state that a BFOQ ought not be based on "the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers. . . ." 29 CFR §1604.1 (iii).

As the Supreme Court stated in *Griggs* v. *Duke Power Co.,* U. S. (1971), "the administration interpretation of the Act by the enforcing agency is entitled to great deference. See also, *United States* v. *City of Chicago,* U.S. (1970); *Udall* v. *Tallman,* 380 U.S. 1 (1965); *Power Reactor Co.* v. *Electricians,* 367 U.S. 396 (1961). Indeed, while we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Of course, Pan Am argues that the customers' preferences are not based on "stereotyped thinking," but the ability of women stewardesses to better provide the non-mechanical aspects of the job. Again, as stated above, since these aspects are tangential to the business, the fact that customers prefer them cannot justify sex discrimination.

The judgment is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Denial of Petition for Rehearing by Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30098

CELIO DIAZ, JR.,
Plaintiff-Appellant,

versus

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(May 10, 1971)

Before TUTTLE, AINSWORTH and SIMPSON, Circuit Judges

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.